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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

MARCUS GARY JOHNSON,

Defendant and Appellant.

A144468

(Solano County
Super. Ct. No. FCR310736)

Appellant Marcus Gary Johnson was arrested when he tried to pass a fraudulent check. He was convicted by a jury of five theft-related offenses. He contends that under the rule announced in *In re Williamson* (1954) 43 Cal.2d 651, 654, his conviction for identity theft under Penal Code section 530.5¹ must be reversed because he was also convicted of false personation in violation of section 529, subdivision (a)(2), a more specialized version of the same offense. We disagree. Identity theft under section 530.5 and false personation under section 529, subdivision (a)(2) are different and distinct offenses.

Johnson also contends his conviction for forgery should be reduced to a misdemeanor. Because he was properly convicted of identity theft, his forgery conviction cannot be reduced under section 473 even though the amount of the forged check was less than \$950. In addition, his sentence was properly enhanced for two prior prison terms; one served for an unspecified 1999 felony conviction and one for a 2007

¹ Unless otherwise specified, all statutory references are to the Penal Code.

vehicle theft in violation of Vehicle Code section 10851. Finally, while Johnson has a persuasive argument that his conviction for commercial burglary under section 459 must be reduced to misdemeanor shoplifting under section 459.5, we will not order redesignation of the offense in this direct appeal from the judgment. Instead, he must file a petition in the trial court pursuant to section 1170.18 to redesignate his conviction for commercial burglary under section 459 to shoplifting under section 459.5. Thus, we affirm the judgment without prejudice to Johnson's right to petition the superior court to redesignate his conviction for commercial burglary as shoplifting .

BACKGROUND

On October 22, 2014, Johnson walked into a check cashing store in Solano County. He tried to cash a check for \$300 and presented identification with a photograph that did not resemble him. When the clerk working in the store asked Johnson for his social security number and a phone number, he replied that he did not have either one with him and went outside the store to retrieve them. The clerk suspected Johnson was trying to pass a bad check. She tried to verify the check's status with a local credit union and was told it was drawn on a closed account. The clerk called the police. Johnson was apprehended when he left the store.

The clerk gave the police the driver's license and check presented by Johnson for payment. Police also retrieved a checkbook from Johnson's pocket when he was searched incident to his arrest. It contained three checks payable to other people.

Three other witnesses testified. Kenneth Roberts did not know Johnson. He renewed his driver's license in July 2014, but never received it in the mail. He never gave Johnson permission to have his driver's license. The driver's license Johnson presented as identification when he tried to cash the check looked like Roberts' most recently renewed license. Shaheem Tekeuchi testified that her checkbooks were taken in a home burglary in 2014. The check Johnson presented for payment was one of her missing checks. She did not know the person listed as the payee on the check and did not give permission for anyone to write the check. John Pascua's home was also burglarized. His checkbook was taken in the burglary. Two checks payable to Pascua from his mother

were in the missing checkbook and were retrieved from Johnson's pocket when he was arrested. Pascua never gave Johnson permission to have the checks.

The jury found Johnson guilty of identity theft in violation of section 530.5, subdivision (a); false personation of another in violation of section 529, subdivision (a)(2); forgery in violation of section 470 subdivision (d); commercial burglary in violation of section 459; and possession of stolen property in violation of section 496, subdivision (a). The court found true allegations that Johnson had served two prior prison terms within the meaning of section 667.5, subdivision (b).

Johnson was sentenced to a four-year prison term consisting of a mid-term sentence of two years for identity theft and two consecutive one-year enhancements for each of his prior prison terms. He was given two-year terms for false personation, forgery and commercial burglary to run concurrently to the sentence for identity theft, and a one-year concurrent sentence for misdemeanor possession of stolen property. He timely appealed.

DISCUSSION

I.

Johnson's principal argument is premised on the *Williamson*² rule, which provides "if a general statute includes the same conduct as a special statute, the court infers that the Legislature intended that conduct to be prosecuted exclusively under the special statute. In effect, the special statute is interpreted as creating an exception to the general statute for conduct that otherwise could be prosecuted under either statute." (*People v. Murphy* (2011) 52 Cal.4th 81, 86.) The *Williamson* rule "applies when (1) 'each element of the general statute corresponds to an element on the face of the special statute' or (2) when 'it appears from the statutory context that a violation of the special statute will necessarily or commonly result in a violation of the general statute.'" (*Ibid.*) According to Johnson, because section 530.5, subdivision (a) is a general statute that criminalizes identity theft and section 529, subdivision (a)(2) is a special statute that also criminalizes

² *In re Williamson, supra*, 43 Cal.2d 651.

identity theft he cannot be convicted of both crimes.³ We disagree. Section 529, subdivision (a)(2) and section 530.5, subdivision (a) are different statutes that proscribe different conduct.

Section 530.5, subdivision (a) makes it unlawful to willfully obtain personal identifying information of another person and use it for some unlawful purpose. Section 529, subdivision (a)(2) makes it unlawful to impersonate another and in such assumed character verify, publish, acknowledge or prove a written instrument intending that it be used as true. Stealing identifying information of another person is not essential for false personation under section 529, subdivision (a)(2), and falsely personating another is not essential for identity theft under section 530.5. (Compare *People v. Casarez* (203 Cal.App.4th 1173, 1192 [discussing acts violating former subdivision 2 of section 529] with *People v. Barba* (2012) 211 Cal.App.4th 214, 223.) Moreover, identity theft requires that personal information be obtained and used without the victim's consent, while consent is irrelevant for false personation. (Compare § 530.5, subd. (a) with *People v. Vaughn* (1961) 196 Cal.App.2d 622.)

As Witkin observes, false personation is addressed in many statutes, some general and some specific. Section 529, it says, is the “most general.” (1 Witkin, Cal. Crim. Law (4th ed. 2012) Crimes Against Property, sec. 202, p.253.) Whether section 529 is the most general form of false personation or not, it most certainly is not a specific form of identity theft prohibited by section 530.5. Johnson was properly convicted of both identity theft under section 530.5 and false personation under section 529, subdivision (a)(2).

³ Although Johnson was given concurrent two-year sentences for each of the crimes in this case, it would be to his advantage to reverse the identity theft conviction under section 530.5 because his forgery conviction would then be reduced to a misdemeanor. Forgery of a check that does not exceed \$950 is a misdemeanor unless the defendant is convicted of both forgery and identity theft under section 530.5. (§ 473, subd. (b).)

II.

In light of our holding that Johnson was properly convicted of identity theft, there is no merit to his argument that his conviction for forgery under section 473 must be reduced to a misdemeanor because he was trying to pass a check for less than \$950. Section 473, subdivision (b) provides that forgery of a check that does not exceed \$950 is a misdemeanor, but goes on to state: “This subdivision shall not be applicable to any person who is convicted both of forgery and of identity theft, as defined in Section 530.5.” Johnson was properly convicted of forgery as a felony under section 473 subdivision (a).

III.

In 2007, Johnson was convicted of two felonies: possession of a controlled substance in violation of Health and Safety Code section 11377, subdivision (a), and unlawful taking of a vehicle in violation of Vehicle Code section, 10851 subdivision (a). He was sentenced to a two-year term for each offense to run concurrently. Johnson argues that his sentence in this case should be reduced by one year because an enhancement for service of a prior prison term was based on the 2007 drug possession charge and it was reduced to a misdemeanor under proposition 47. According to Johnson, reduction of the drug possession charge to a misdemeanor under section 1170.18 means it must be treated as a misdemeanor “for all purposes.” Thus, it could not be the basis for a sentence enhancement for service of a prior prison term as specified in section 667.5, subdivision (b). We disagree.

Although Johnson’s argument begs the question whether or not an enhancement for service of a prior prison term may be assessed for a felony that has been redesignated as a misdemeanor under section 1170.18, we need not answer the question to resolve this case. In *People v. Johnson* (Oct. 3. 2016, A144466) [nonpub. opn.] also filed today, we hold that the trial court correctly declined to redesignate Johnson’s 2007 conviction for unlawful taking of a vehicle as a misdemeanor. It remains a felony and was a concurrent basis for Johnson’s earlier prison term. Thus, we conclude the enhancement for a prior

prison term imposed under section 667.5, subdivision (b) for Johnson's 2007 conviction was correct.

IV.

Johnson's sentence was also enhanced by one year for a prison term served before the 2007 conviction for unlawful taking of a vehicle. He contends there is no substantial evidence to support the imposition of this prior prison term enhancement.

"Our function, as an appellate court, [is] to review the record in the light most favorable to the judgment [citation] to determine whether substantial evidence supports the fact finder's conclusion, i.e., whether a reasonable trier of fact could have found that the prosecution had sustained its burden of proving the defendant guilty beyond a reasonable doubt." (*People v. Tenner* (1993) 6 Cal.4th 559, 567.) "Imposition of a sentence enhancement under Penal Code section 667.5 requires proof that the defendant: (1) was previously convicted of a felony; (2) was imprisoned as a result of that conviction; (3) completed that term of imprisonment; and (4) did not remain free for five years of both prison custody and the commission of a new offense resulting in a felony conviction." (*Id.* at p. 563.) One way the prosecution may sustain its burden of proving a sentence enhancement is through introduction of "what is commonly known as a 'prison packet' (i.e., records maintained by the institution where the defendant was incarcerated, or certified copies thereof)" pursuant to section 969b that may be introduced as prima facie evidence that the defendant served a term of imprisonment. (*Ibid.*)

A prison packet was introduced in this case as People's Exhibit 3. Johnson contends it was insufficient evidence that he served more than one prior prison term because it contained only an abstract of judgment for his 2007 conviction. But in context, it is clear from the prison packet that Johnson served a term in state prison for an earlier felony from April 16, 2002, until his parole on November 3, 2003. It is also clear from the prison packet that Johnson had a series of parole revocations after November 2003 and was never free of prison custody for five years before his 2007 commitment. Moreover, the abstract from the 2007 commitment reflects a one-year enhancement for

this prior term in state prison. There was sufficient evidence to support both section 667.5, subdivision (b) enhancements for prior prison terms.

V.

Finally, in a supplemental brief Johnson contends his conviction for commercial burglary under section 459 must be reduced to misdemeanor shoplifting under section 459.5. Section 459.5, enacted as part of Proposition 47, makes it a misdemeanor to enter an open business during regular business hours with the intent to commit larceny where the value of the property taken does not exceed \$950. (§ 459.5, subd. (a).)

The claim Johnson makes was recently addressed in a persuasive opinion by the Sixth District in *People v. Garrett* (2016) 248 Cal.App.4th 82 (review granted August 24, 2016, S236012). Following an extensive analysis of the statutory definition of theft provided in the Penal Code and the language used in section 459.5, the *Garrett* court concluded that a defendant convicted of commercial burglary who facilitated burglary through identity theft by using a stolen credit card to purchase property valued at less than \$950 was eligible to be resentenced for shoplifting. (*Ibid.*) We can discern no meaningful distinction why the rationale of *Garrett* would not operate in the same fashion here to reduce Johnson's burglary to shoplifting under section 459.5.

But we should not impose this result on direct appeal from the judgment. Section 1170.18 subdivision (a) provides: "A person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section ('this act') had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this act." Although Johnson was sentenced after the effective date of proposition 47, he committed his offense on October 22, 2014, 13 days before it was effective. Thus, at the time of offense the act was not in effect, and Johnson's

remedy is to petition the superior court for redesignation of the commercial burglary conviction as shoplifting under section 459.5.

DISPOSITION

The judgment is affirmed without prejudice to affording Johnson an opportunity to petition the superior court under section 1170.18 to have his conviction for commercial burglary redesignated as shoplifting under section 459.5.

Siggins, J.

We concur:

McGuiness, P.J.

Jenkins, J.